83-614

No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SECURITIES INDUSTRY ASSOCIATION,

Petitioner,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

At issue is a decision of the Court of Appeals upholding a ruling of the Federal Reserve Board. That decision permits the largest bank holding company in the United States to acquire the nation's largest discount broker and thereby to engage in public securities brokerage—a business no bank affiliate has conducted since federal restrictions on bank securities activities were enacted in the wake of the national banking crisis fifty years ago. The specific questions presented are:

1. Did the Court of Appeals err in affirming a Federal Reserve Board ruling that a nonbanking activity, here public securities brokerage, is "so closely related to banking . . . as to be a proper incident thereto" within the meaning of the Bank Holding Company Act, where the activity is not one traditionally performed by banks, or even one that supports a banking activity, but is only "functionally similar" to some banking operations?

2. Did the Court of Appeals err in affirming a Federal Reserve Board ruling that the flat prohibitions of the Glass-Steagall Act restricting both direct and indirect securities activities of banks need not be construed consistently, so that depending upon an administrative view of the risks posed, a bank affiliate may be authorized to engage principally in securities activities that are barred entirely to banks?

PARTIES TO THE PROCEEDING

In addition to the petitioner* and respondents listed in the caption, the following are also respondents in this action: Paul A. Volcker as Chairman of the Board of Governors of the Federal Reserve System, Preston Martin, Nancy H. Teeters, J. Charles Partee, Henry C. Wallich, Emmet J. Rice and Lyle E. Gramley, as Members of the Board of Governors of the Federal Reserve System, and BankAmerica Corporation as Intervenor in the proceeding below.

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* Pursuant to Rule 28.1 of this Court, petitioner states as follows: The Securities Industry Association is a national trade association representing more than 540 securities brokers, dealers and underwriters who are responsible for over 90 percent of the securities brokerage and investment banking business in the United States.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Securities Industry Association ("SIA"), respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 15, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (1a)[1] is unreported. The January 7, 1983 order of the Board of Governors of the Federal Reserve System ("Board") approving

1 Citations to material printed in the Appendix submitted herewith appear as "___a".

the application of BankAmerica Corporation to acquire The Charles Schwab Corporation (21a) is reported at 69 Fed. Res. Bull. 105 (1983).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on July 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This action concerns two federal statutes designed to restrict the commercial activities of banks and their affiliates: the Glass-Steagall Act,[2] and the Bank Holding Company Act.[3]

Enacted in 1933 after the collapse of the banking system, the Glass-Steagall Act prohibits banks entirely from engaging in certain securities activities, and it restricts banks from indirectly doing so by prohibiting either affiliation or management interlocks with entities principally or primarily engaged in these activities.

Sections 16 and 21 of the Act apply to the direct activities of banks. Section 16 defines the incidental powers that may be exercised by a national bank, and provides:

> The business of dealing in securities and stock by [a national bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no

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2 The Glass-Steagall Act was enacted as part of the Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162, and is codified in different sections of Title 12 of the United States Code. Relevant to this petition are Sections 16, 20, and 21 of the Act, 12 U.S.C. §§ 24 (Seventh), 377, 378. The relevant sections are set out in the Appendix (53a-55a).

3 12 U.S.C. §§ 1841, *et seq*. Relevant text of this Act is also set out in the Appendix (56a).

> case for its own account, and the [national bank] shall not underwrite any issue of securities or stock . . .

12 U.S.C. § 24 (53a). Section 21, in parallel fashion, makes it unlawful for any organization that is "issuing, underwriting, selling, or distributing" securities, to engage "to any extent whatever in the business of receiving deposits." 12 U.S.C. § 378(a)(1) (54a).

Section 20 restricts banks from indirectly engaging in the prohibited activities by providing that no member bank of the Federal Reserve System may be affiliated with an organization,

> engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes or other securities.

12 U.S.C. § 377 (54a). Section 32 similarly prevents officer, director, or employee interlocks between any member bank of the Federal Reserve System and any entity primarily engaged in "the issue, flotation, underwriting, public sale or distribution" of securities. 12 U.S.C. § 78 (55a).

The Bank Holding Company Act, enacted in 1956, prohibits bank holding companies from owning or controlling any entity engaged in "activities other than banking," 12 U.S.C. § 1843(a), with only limited, expressly defined exceptions. The one exception relevant here is contained in Section 4(c)(8) of the Act, which, as amended in 1970, allows a bank holding company to own an entity,

> the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking as to be a proper incident thereto.

12 U.S.C. § 1843(c)(8) (56a).

STATEMENT OF THE CASE

A. The Administrative Proceedings

On March 8, 1982, BankAmerica Corporation ("BAC"), the parent holding company of this nation's largest bank, applied to the Board under Section 4(c)(8) of the Bank Holding Company Act for permission to acquire The Charles Schwab Corporation, a company principally engaged in public securities brokerage through its wholly-owned subsidiary, Charles Schwab & Co., Inc. ("Schwab"). (3a.) Public securities brokerage is a nonbanking activity which the Board had never previously found to be permissible for a bank affiliate under Section 4(c)(8). The Board published notice of BAC's application, and requested comments from interested parties. (2a; *see* 47 Fed. Reg. 16104 (April 14, 1982).)

SIA objected to the application and requested an evidentiary hearing thereon. The Board scheduled an expedited hearing before an Administrative Law Judge to consider issues raised by the SIA.[4] Following the submission of written statements and rebuttal testimony, a six-day hearing was held for purposes of cross-examining witnesses. (22a.) After submission of post-hearing briefs, the Administrative Law Judge filed a Recommended Decision favoring the acquisition. And, on January 7, 1983, the Board issued an order approving the first affiliation between a bank holding company and a brokerage firm since the early days of the Great Depression. (4a.)

In its order, the Board found that BAC's proposed securities brokerage activities were permissible under Section 20 of the Glass-Steagall Act, 12 U.S.C. § 377, even though that Section of the Act prohibits banks from affiliating with organizations "engaged principally" in the "public sale" of securities. (54a.) The Board conceded that banks had not previously engaged in the sort of retail brokerage business conducted by Schwab

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[4] Upon consent, the Department of Justice was permitted to intervene in the proceeding before the Board. (22a.)

(25a) and did not find that Schwab's brokerage business would facilitate otherwise proper banking activities. The Board nevertheless concluded that discount securities brokerage, as conducted by Schwab, was an activity "closely related to banking" within the meaning of Section 4(c)(8) of the Bank Holding Company Act. The Board reached this conclusion merely because in its view the activity was "operationally and functionally very similar to the types of brokerage services that are generally provided by banks and that banking organizations are particularly well-equipped to provide such services." (25a; footnote omitted.) The Board also concluded that the acquisition satisfied the "net public benefits" test of Section 4(c)(8). (42a.)

The SIA filed a timely petition with the Court of Appeals for the Second Circuit, pursuant to 12 U.S.C. § 1848, seeking review of the Board's unprecedented order.

B. The Court of Appeals Decision

The Court of Appeals deferred to the Board and accepted its construction of the terms of both the Glass-Steagall Act and the Bank Holding Company Act. (3a.)

Although four sections of the Glass-Steagall Act restrict the securities activities of banks and their affiliates, the Second Circuit held that the acquisition should be judged only against the "public sale" provision of Section 20 which, it concluded, should not be read to include brokerage activities. (5a.) The court was unpersuaded that Section 20 should be read consistently with Section 16 of the Act, which expressly restricts the securities brokerage activities of banks. (12a.) The court was of the further view that bank affiliates could be permitted under Section 20, depending upon the Board's assessment of the risks involved, to engage principally in securities activities that are barred entirely for banks. (12a.)

In holding the acquisition also to be acceptable under the Bank Holding Company Act, the court below embraced the Board's interpretation that Section 4(c)(8) permits a nonbank

affiliate to engage in *any* activity that is operationally similar to a banking activity. (15a.) The court rejected any construction of Section 4(c)(8) that would provide that bank holding company activities which are not traditionally performed by banks must be undertaken only in furtherance of otherwise permissible bank activites before they can be deemed to be "so closely related to banking . . . as to be a proper incident thereto." (18a.)

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECISION RAISES IMPORTANT ISSUES OF NATIONAL SIGNIFICANCE

Reversing fifty years of consistent understanding of the limits imposed by federal law, the administrative ruling at issue allowed the largest bank in the nation to affiliate with this country's largest discount broker. This ruling is itself of major significance. The decision below, however, has an even broader importance, in that it substantially revises the existing statutory limitations on the activities of bank affiliates and the authority of bank regulators. (*See, infra*, pp. 11-18.)

This is the second case to reach this Court concerning bank securities activities only recently sanctioned by federal banking regulators. Like the first such case, the decision herein is of general applicability.[5] It holds not merely that BAC may acquire Schwab, but that *all* bank holding companies may acquire securities brokers. Less than one month after entry of the decision below, the Board promulgated new regulations

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5 In *Securities Industry Ass'n* v. *Board of Governors*, No. 32-1766 (*cert. granted* October 3, 1983), this Court agreed to review a Court of Appeals decision affirming the Board's determination that banks may underwrite short-term, large denomination notes, despite the flat prohibition of the Glass-Steagall Act barring bank marketing of "notes or other securities."

specifically adding securities brokerage to its list of activities that are generally permissible to bank holding companies. *See* 48 Fed. Reg. 37003 (Aug. 16, 1983).

It is especially significant that this decision comes at a time when Congress itself has been considering major legislative proposals to alter existing federal restrictions on financial institutions.[6] In each of several recent sessions Congress has enacted major reforms to the federal banking laws,[7] but, in each instance, Congress has determined not to modify existing restrictions on bank securities activities.[8]

Federal banking regulators, in turn, have been under intense pressure from the institutions they regulate simply to rewrite

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6 *See, e.g.*, Financial Institutions Deregulatory Act, S. 1609 and H.R. 3537, 98th Cong., 1st Sess. (1983), which would substantially expand existing powers of bank holding companies. In addition to this proposal, Congress currently is considering legislation to reform the federal deposit insurance system, ban the acquisition of banks by non-depository institutions, restructure the federal system for regulating financial institutions and reform the requirements of membership in the Federal Reserve System. *See Congress Not Expected to Move on Any Major Reform Bills This Year*, 41 Wash. Fin. Rep. (BNA) No. 10 at 326 (Sept. 12, 1983).

7 *See* Garn-St.Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 132 (1982); Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980); Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641 (1978).

8 To the contrary, Congress has reaffirmed its support for the prohibitions on bank securities activity. In 1980, for example, Congress expressed its continuing opposition to any administrative adjustment of the Glass-Steagall prohibitions when it enacted the Depository Institutions Deregulation and Monetary Control Act of 1980, P.L. No. 96-221, 94 Stat. 132 (1980). In that Act, Congress extended to the Comptroller of the Currency authority to issue such rules as were needed to "carry out the responsibilities of the office," but specifically made clear that the Comptroller had *no* authority to issue regulations concerning "securities activities of National Banks under the Act commonly known as the 'Glass-Steagall Act'." 12 U.S.C. § 93a.

previously recognized limits on the activities of banks and bank affiliates, without Congressional action. The application challenged here itself set off a wave of applications to other banking agencies, followed by a series of administrative "interpretations" authorizing a variety of bank securities brokerage activities for the first time in half a century. Thus:

— The Comptroller of the Currency has repudiated his long-standing construction of the Glass-Steagall Act as barring public brokerage activities by national banks (an interpretation first articulated in hearings in 1934 before the Congressional Committees considering the initial amendments to the Act, and consistently followed for half a century);[9]

— The Federal Deposit Insurance Corporation has adopted new rules that will permit not only brokerage but securities underwriting by affiliates of the 9,000 state chartered banks under its jurisdiction;[10] and

— The Federal Home Loan Bank Board has authorized the first nationwide joint venture by federally chartered savings and loan associations in approving a thrift-sponsored securities brokerage and investment advisory firm.[11]

As a result, while there was not a single bank or bank affiliate engaged in public securities brokerage at the beginning of

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9 *Decision of the Comptroller of the Currency on the Application by Security Pacific National Bank to Establish an Operating Subsidiary To Be Known as Security Pacific Discount Brokerage Services, Inc.* (August 26, 1982).

10 *FDIC Statement of Policy on the Applicability of the Glass-Steagall Act to Securities Activities of Subsidiaries of Insured Non-Member Banks*, 47 Fed. Reg. 38984 (Sept. 3, 1982). *See also* 48 Fed. Reg. 22155, *et seq.* (May 17, 1983).

11 *Decision of the Federal Home Loan Bank Board on the Service Corporation Application of Coast Federal Savings & Loan Association, Perpetual American Federal Savings & Loan Association and California Savings & Loan Association* (May 6, 1982).

1982, more than 600 bank and thrift institutions reportedly had announced plans to enter that business by the end of that year. Hector, "The Banks Invade Wall Street," *Fortune*, February 7, 1983, at 44.

Each of these administrative actions is now subject to court challenge.[12] Congressional reaction has also been sharp. A Conference Committee to which major bank reform legislation was referred took the highly unusual step in its Report of directing the Federal Home Loan Bank Board that it:

> should not approve, in the absence of clear and specific Congressional authorization, any new regulation expanding activities of [savings and loan subsidiaries] . . .

S. Rep. No. 97-641, 97th Cong., 2d Sess. 88 (1982). The Chairman of the Senate Banking, Housing and Urban Affairs Committee publicly has described the banking agencies' regulatory changes as "go[ing] to the basic structure of our financial system." *See FDIC Schedules Hearing on Bank Securities Trading Proposal*, 40 Wash. Fin. Rep. (BNA) No. 21 at 1085 (May 23, 1983). And, the Chairman of the House Banking, Finance and Urban Affairs Committee even introduced legislation designed to impose a moratorium on the expansion of activities by all financial services institutions, which would result in BAC's having to divest itself of Schwab. H.R. 3499, 98th Cong., 1st Sess. (1983).

Nor have the recent administrative actions been limited to bank brokerage activities. For example, one bank agency has recently ruled that shares in bank-operated collective investment funds do not constitute "securities" and so may be underwritten by banks, despite this Court's contrary holding in *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971) ("*ICI*

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12 *See Securities Industry Ass'n* v. *Conover*, No. 82-2865 (D.D.C. filed Oct. 6, 1982); *Investment Co. Inst.* v. *United States*, No. 82-2532 (D.D.C. filed Sept. 8, 1982); *Securities Industry Ass'n* v. *Federal Home Loan Bank Board*, No. 82-1920 (D.D.C. filed July 12, 1982).

I").[13] Another agency has just approved the first bank-run investment advisory service to be offered in conjunction with securities brokerage for the public.[14]

All of this has been occurring even though, of course, it is Congress, and not administrative agencies, which should set national policy. As this Court recently put it in *BankAmerica Corporation* v. *United States*, 51 U.S.L.W. 4685, 4688 (June 8, 1983), policy determinations "must be implemented by Congress and not by a crabbed [administrative] interpretation of the words of the statute."

The ruling here, although not necessarily involving all of the same issues as the various rulings cited above, is a seminal agency action which has influenced the ongoing expansion of banks into securities brokerage and other nonbanking areas. Absent action by this Court, the decision below will only encourage further administrative dismantling of statutory restrictions on bank activities. Given its national significance, this case warrants review by this Court.

II.

THE COURT OF APPEALS DECISION RESOLVES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

Not only is the result reached by the Court below of national significance, but the analysis adopted in doing so is equally far-ranging. By its decision, the Court of Appeals in effect sanctioned administrative redrafting of Congressionally mandated restrictions on bank activity contained in both the Bank Holding Company Act and the Glass-Steagall Act.

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13 *Decision of the Comptroller of the Currency on the Application by Citibank to Establish Common Trust Funds for the Collective Investment of Individual Retirement Account Trusts* (October 28, 1982).

14 *Decision of the Comptroller of the Currency Concrning an Application by American National Bank of Austin, Texas, to Establish an Operating Subsidary to Provide Investment Advice* (September 2, 1983).

A. The Court of Appeals Decision Alters Existing Statutory Restrictions on the Activities of Bank Affiliates Contained in the Bank Holding Company Act

The Bank Holding Company Act, enacted in 1956, generally prohibits bank holding companies from owning corporations engaged in any "activities other than banking", 12 U.S.C. § 1841, *et seq.* As explained by the Chairman of the House Committee on Banking and Currency, the legislation was designed to "divorce from holding companies" the power "to engage in unrelated business." 101 Cong. Rec. 8020 (1955) (remarks of Rep. Spence).[15]

The few narrow exceptions to this general restriction permitted bank affiliates to provide support activities such as owning the physical property occupied by a bank and operating a safe deposit business. *See* 12 U.S.C. § 1843(c)(1). The exception involved in this case, while less specific, was similarly understood to have a narrow focus. As enacted in 1956, it authorized only activities determined by the Board to be "so closely related to the business of banking . . . as to be a proper incident thereto." Pub. L. No. 511, § 4(c)(6), 70 Stat. 137 (1956). Senator Robertson, Chairman of the Senate Committee on Banking and Currency, and a sponsor of the original Act, explained that the purpose of the exception was to allow "holding companies to continue to carry on functions closely related to banking which are *essential* for their efficient operation." 102 Cong. Rec. 6755 (1956) (emphasis added).[16]

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15 A member of the Senate Banking and Commerce Committee explained during debate on the controversial bill:

> [M]any, many years ago Congress adopted the philosophy that banks ought not to engage in outside business. . . . [W]hat we are trying to do is bring bank holding companies within the same rules and regulations that apply to ordinary banks.

102 Cong. Rec. 6933, 6936 (1956) (remarks of Sen. Capehart).

16 *See also*, H.R. Rep. No. 609, 84th Cong., 1st Sess. 16-17 (1955) ("Your Committee has, however, exempted certain specific business which it believes to be obviously incidental to the business of banking."); S. Rep. No. 1095, 84th Cong., 1st Sess. 2 (1955).

A close connection was thus required between any proposed nonbanking activity and the business of banking. As William McChesney Martin, then the Board's Chairman, testified during hearings in 1969 on proposed amendments to the Act, the "so closely related" exception required "a direct and significant connection between the proposed activities of the company acquired and the business of banking." *See* "Bank Holding Company Act Amendments," *Hearings Before the House Committee on Banking and Currency*, 91st Cong., 1st Sess., 199 (1969) (testimony of Hon. William McChesney Martin). *See also* 116 Cong. Rec. 41959 (1970) (letter of Hon. Arthur Burns).

The Board urged Congress in 1969 to eliminate the "so closely related" test and to substitute a more flexible standard of "functionally related to banking" (*id.*), but Congress did not do so. As re-enacted in 1970, the provision required that the Board find proposed activities to be "so closely related to banking . . . as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8).[17]

Although the Board has some latitude under Section 4(c)(8) to determine what activities comport with the "so closely related" standard, the Board does not have the latitude to rewrite the standard itself, contrary to Congressional intent. Yet, that is what has occurred. Despite the statutory language and its legislative history, the Board here did not require that

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17 While both Houses of Congress included a "functionally related" test in bills which they passed to amend the Bank Holding Company Act, the modification was deleted in Conference Committee. The only change Congress made in 1970 was to delete the words, "the business of," from the statutory phrase "closely related to [the business of] banking." This change made it permissible for a holding company affiliate to engage in activities closely related to those of banks in general, even if the specific holding company involved were not so engaged. *Board of Governors* v. *Investment Co. Institute*, 450 U.S. 46, 73, n.51 (1981). *See also* H.R. Rep. No. 1747, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Adm. News 5561, 5572; 116 Cong. Rec. 41956 (1970) (remarks of Rep. Widnall).

the proposed brokerage activity have a "direct and significant connection" with banking, or indeed any connection with banking at all. The Board instead approved the services simply because it found them "operationally and functionally very similar to the types of brokerage services that are generally provided by banks and that banking organizations are particularly well-equipped to provide such services." (25a.)

The operational or functional *similarity* found sufficient by the Board is a far cry from the operational *connection* required by Congress. This is no mere matter of semantics. By administrative fiat, the Board in effect has substituted its proposed "functionally related" criterion for the statutorily required "so closely related" test—exactly what Congress refused to do in 1970. And, by deferring to the Board's approach, the court, conflicting with a decision in another Circuit (*see*, *infra*, pp. 18-19), sanctioned this exercise in administrative lawmaking.

The Court of Appeals cited this Court's decision in *Board of Governors* v. *Investment Co. Institute*, 450 U.S. 46 (1981) ("*ICI* II") in support of its conclusion that mere "functional similarity" is sufficient to satisfy Section 4(c)(8). But, in *ICI* II, the service proposed under the Bank Holding Company Act, investment advice, was a service that banks themselves concededly had performed for decades. *Id.*, 450 U.S. at 55. The proposed service therefore was not only "closely related" to banking services, it *was* a banking service. Accordingly, this Court did not need to, and did not, reach the further, significant question at issue here: the relationship required by Section 4(c)(8) between banking and a proposed activity that banks have *not* performed in the past.

There is no dispute that the retail brokerage business at issue has not previously been a banking activity. (15a-16a; 25a.) Nor is this even an instance where approval was sought for brokerage activities that facilitate or support other banking operations, such as bank trust departments. Rather, the activity approved here is to be aggressively marketed to the public in general as an independent, nonbank undertaking.

The Board's "functional similarity" rationale, now embraced by the court below, will have far-ranging consequences beyond the confines of this case. It can be used to sanction any number of nonbanking activities. That banks have the capacity to execute "wire transfers" of funds, for example, could be argued as sufficient under this standard to allow bank affiliates to enter the public telecommunications industry.[18] Even the long history of bank incentive programs, providing customers with toasters, calculators and other consumer goods, could be claimed to be enough to justify entry into the "functionally similar" activity of retail consumer sales.

In sum, absent action by this Court, the statutory language of the Bank Holding Company Act will remain turned inside out, with a narrowly drawn exception to a broad Congressional prohibition transformed administratively into an unintended and open-ended authorization.

B. The Court of Appeals Decision Alters Existing Statutory Restrictions on the Activities of Bank Affiliates Contained in the Glass-Steagall Act

The opinion below similarly sanctioned administrative rewriting of the Glass-Steagall Act and vested in the Board regulatory authority under that Act withheld by Congress. Representing Congressional reaction to the financial chaos of the late 1920's and the ensuing banking crisis of the early 1930's, the Glass-Steagall Act was a "drastic step" considered to be a "prophylactic measure directed against conditions that the experience of the 1920's showed to be great potentials for abuse." *ICI* I, 401 U.S. at 629, 639.

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18 Indeed, the American Bankers Association, responding recently to a Board proposal to expand its pre-approved list of nonbanking activities, requested the Board to recognize a variety of telecommunications services as now being permitted by Section 4(c)(8). *See ABA Objects to Fed's Proposed Reg Y Revision*, 41 Wash. Fin. Rep. (BNA) No. 7 at 225 (Aug. 15, 1983).

Congress did not simply regulate the securities activities of banks through the Glass-Steagall Act; it prohibited them, with only narrowly circumscribed exceptions. Both direct and indirect bank participation in the prohibited activities were covered. As described above (pp. 2-3), through Sections 16 and 21 of the Act Congress entirely prohibited banks from engaging directly in the activities, and through Sections 20 and 32 it restricted banks from indirectly doing so by either affiliation or management interlocks (53a-55a). More specifically, Section 16 of the Act restricts banks' dealing in securities to "purchasing and selling" solely as an accommodation to banking customers,[19] and Section 20 prohibits bank affiliation with any entity principally engaged in the "public sale" of securities.

Despite the established rule of statutory construction that all sections of a comprehensive statutory scheme should be read together,[20] and the concession of the Board's own counsel that the phrases "public sale" and "purchasing and selling" should be read consistently,[21] the court below concluded that the sections were not co-extensive.

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19 Contemporaneously with enactment of the Glass-Steagall Act and during the ensuing 50 years, the Comptroller of the Currency ruled that national banks were prohibited from engaging in brokerage activities except as an accommodation to customers with whom they had pre-existing banking relationships. The Comptroller's recent effort to reverse this half century of consistent administrative construction and to approve retail securities brokerage as an activity for banks is, as noted previously, now under court challenge. *Securities Industry Ass'n* v. *Conover*, No. 82-2865 (D.D.C. filed Oct. 6, 1982).

20 *E.g.*, *N.L.R.B.* v. *Lion Oil Co.*, 352 U.S. 282, 288 (1957).

21 The Board's counsel, while contending that the proposed acquisition was not prohibited under the Glass-Steagall Act, nevertheless urged before the Administrative Law Judge in the proceedings below that the phrases, "purchasing and selling" and "public sale," were functional equivalents and as parts of a comprehensive statutory scheme should be construed consistently as encompassing brokerage. (Post-Hearing Brief of Board Counsel at 19-23).

Avoiding this Court's repeated instruction that the terms of the Glass-Steagall Act are *not* to be construed narrowly,[22] the court below concluded that the prohibition in Section 20 against bank affiliates' being principally engaged in the "public sale" of securities was to be construed according to its technical meaning. The court viewed the term as referring only to large-scale offerings undertaken for an issuer and not to purchasing and selling of securities undertaken by a broker. And, the court held that for the first time in 50 years a bank affiliate could engage principally in retail securities brokerage, even though a bank may be barred entirely from it.

The court below repeatedly cited (12a, 13a) this Court's statement in *ICI* II that the structure of the Glass-Steagall Act "reveals a Congressional intent to treat banks separately from their affiliates." 450 U.S. at 59 n.24. But, as this Court there made clear, the difference between the prohibitions of Sections 16 and 20 of the Act relate solely to the permitted *level* of securities activities for banks, as opposed to affiliates: Section 16 bars banks entirely from engaging in the prohibited activities, while Section 20 bars bank affiliates only from engaging principally in such activities. Nowhere did this Court suggest that the two sections were aimed at different *types* of activities. Indeed, in *ICI* I, 401 U.S. at 626, n.12, this Court had expressly noted the congruity of the terms used in the sections of the Act that bar indirect securities activities and the sections that bar securities activities directly:

> The limitations that the banking laws place on the activities of national banks are at least as great as the limitations placed on the activities of their affiliates. For example, § 32 refers to the "public sale" of stocks or securities while § 21 proscribes the "selling" of stocks or securities.

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22 *See ICI* II, 450 U.S. at 65; *ICI* I, 401 U.S. at 635; *Board of Governors* v. *Agnew*, 329 U.S. 441, 446-47 (1947); *Awotin* v. *Atlas Exchange National Bank*, 295 U.S. 209, 212 (1935) (construing the term "without recourse" used in the McFadden Act and reenacted as part of the Glass-Steagall Act). Indeed, the court below also gave the term, "without recourse", an inappropriately narrow reading. (13a, n.4.)

The court below also sought support for its holding in *Board of Governors* v. *Agnew*, 329 U.S. 441 (1947), concluding that this Court had implicitly determined the present issue in that action. However, *Agnew* was a case concerning Section 32 of the Act, in which this Court did not, and did not have to, reach the question of whether brokerage activities are prohibited for banks or whether the term "public sale" should be construed consistently with the term "purchasing and selling" used elsewhere in the Act. This Court certainly did not rule in *Agnew* that bank affiliates may engage principally in activities that are prohibited entirely for banks.

The view of the court below in the latter respect was as follows (12a):

> We think, however, that the latitude the Act grants bank holding companies partially to engage in activities such as underwriting, which implicate the Act's policies whether conducted by banks or bank holding companies, suggests that bank holding companies can, under the Act, be allowed principally to engage in activities which pose the dangers the Act addressed only when conducted by banks.

This conclusion was unaccompanied by citation, because it marks the first time any court has ruled that the coverage of Section 20 depends upon an assessment of whether the activities involved "pose the dangers the Act addressed". By this unprecedented ruling the Court, in effect, vested in the Board regulatory authority to exempt activities from coverage of Section 20 depending upon the Board's view of the risks involved. The court thereby changed the Section from the prohibitory statute intended by Congress to a regulatory Act that permits administrative exceptions to its otherwise flat prohibitions, and adopted a rationale that could be used to except any number of securities activities from its restrictions.[23]

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23 In marked contrast with Section 32 of the Act, which permits the Board to exempt certain arrangements from the Act's management interlock provisions, Section 20 vests *no* exemptive authority whatsoever in the Board to authorize bank securities activities.

In short, the decision below under the Glass-Steagall Act, like the decision under the Bank Holding Company Act, has far-reaching implications. It, too, warrants review by this Court to avoid the uncertainty and litigation that inevitably will otherwise result.

III.

THERE IS A DIRECT CONFLICT BETWEEN THE CIRCUITS AS TO THE ACTIVITIES THAT BANK AFFILIATES ARE PERMITTED TO CONDUCT UNDER FEDERAL LAW

As discussed above (pp. 11-14), the administrative construction of Section 4(c)(8) of the Bank Holding Company Act affirmed by the court below rejects any requirement that the activities of bank affiliates, not traditionally performed by banks, must be limited to those that facilitate or support authorized bank activities. (18a.) Rather, the Board's ruling found mere "functional similarity" between proposed nonbanking activities and banking to be sufficient. By affirming this standard, the decision below conflicts with the prior interpretation of Section 4(c)(8) by the Fifth Circuit Court of Appeals.

In *Alabama Association of Insurance Agents* v. *Board of Governors*, 533 F.2d 224 (5th Cir. 1976), *cert. denied*, 435 U.S. 904 (1978), the Fifth Circuit refused to adopt the unlimited "functional similarity" standard accepted here. In reviewing a regulation adopted by the Board permitting bank affiliates to engage in a variety of insurance brokerage activities, the court there held that Section 4(c)(8) permitted only those activities where there was demonstrated a "direct relationship" between the insurance brokering and "an extension of credit or other financial services," *id.* at 240, where the brokering was "helpful, and perhaps essential, to the success of the [banking] enterprise," *id.* at 241, or where the insurance brokering was

undertaken specifically on behalf of a *bank*. *Id.* The Fifth Circuit rejected the proposition that a bank affiliate could engage in other, *functionally identical* insurance brokering activities because they did not "contribute to the operations of those subsidiaries actually engaged in the banking business." *Id.*

Thus, the "functional similarity" test adopted by the Second Circuit here was rejected by, and conflicts with, the holding of the Fifth Circuit.[24] In order to resolve the consequent and significant uncertainty created, this Court should exercise its supervisory power to review the decision below.

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24 Nor does the decision in *National Courier Association* v. *Board of Governors*, 516 F.2d 1229 (D.C. Cir. 1975), cited both by the Board (24a) and the Court of Appeals (14a), support the rationale adopted below. In the *National Courier* case the court found that courier activities involving materials other than financial data and offered to the general public were not even properly "incidental" to an activity that was closely related to banking, let alone "closely related" themselves to a banking activity. 516 F.2d at 1241. And, that was so even though the proposed public courier activities were functionally identical to courier services otherwise found to be proper for banks.

CONCLUSION

For all and each of the foregoing reasons, this Court should issue a Writ of Certiorari to review the judgment and opinion of the Second Circuit Court of Appeals.

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New York, New York

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